Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors

HIGH COURT (PENANG) — CIVIL SUIT NO 22–16–91
EDGAR JOSEPH JR J
7 FEBRUARY 1992

Civil Procedure *— Cause of action — Whether disclosed by indorsement in writ of summons — Whether legal right sufficient to support cause of action identified in supporting affidavit*

Civil Procedure *— Injunction — Interlocutory injunction — Circumstances in which application may be made ex parte*

Civil Procedure *— Injunction — Interlocutory injunction — Delay in seeking injunction — Relevance when considering balance of convenience — Effect of delay*

Civil Procedure *— Injunction — Interlocutory injunction — Injunctions obtained ex parte — Non-disclosure of material fact — Whether there is absolute right to set aside injunctions — Whether non-disclosure was so severe that its disclosure would result in non-granting of injunctions*

Civil Procedure *— Locus standi — Action for declaration that alteration of company's articles void and of no effect — Right of member of company to commence action — Necessity for member to sue in representative capacity — Rules of the High Court 1980 O 15 r 12(1)*

Companies and Corporations *— Members' rights — Right of member to vote by proxy granted by statute — Whether right to appoint proxy may be excluded or restricted by articles of association of company — Companies Act 1965 s 149(1)*

Companies and Corporations *— Members' rights — Right of member to commence action for declaration that alteration of company's articles void and of no effect — Necessity for member to sue in representative capacity — Locus standi — Rules of the High Court 1980 O 15 r 12(1)*

Companies and Corporations *— Proxies — Exclusion — Proxy wrongfully excluded from meeting — Whether an irregularity curable by majority — Whether meeting null and void — Whether proceedings at meeting could be validated — Companies Act 1965 s 355(1) & (3)*

Words and Phrases *— 'Proceeding' — Companies Act 1965 s 355(1)*

The plaintiff was the registered shareholder of ordinary shares in the first defendant. The second to seventh defendants were directors and shareholders of the first defendant. The plaintiff had obtained three ex parte interlocutory injunctions ('the injunctions') to restrain the first defendant from proceeding with or holding its extraordinary general meeting scheduled for 31 January 1991 ('the EGM') or any adjournment thereof which had been called for the purpose of altering art 56 of its articles of association so as to impose a shareholding qualification on directors and to restrain the first to seventh defendants from implementing and/or exercising their powers to effect certain resolu-

tions passed at the 42nd annual general meeting held on 21 January 1991 ('the AGM') of the first defendant. The defendants made these applications to discharge the injunctions.

In the indorsement to the writ herein filed on 23 January 1991, the plaintiff claimed to have instituted the action for and behalf of himself and other shareholders of the first defendant other than the second to seventh defendants. The calling of the EGM, at which it was intended to pass the resolution to alter art 56 aforementioned, was said to be an abuse of the powers of the second to seventh defendants as directors of the first defendant, was not for the benefit of the first defendant, and was a fraud on the minority shareholders of the first defendant. The sole purpose of passing the resolution was said to be to perpetuate the second to seventh defendants' control over the first defendant. As for the AGM, it was expressly stated in the notice calling for the AGM that all proxy forms should be deposited at the first defendant's registered office at least 48 hours before the AGM. The plaintiff had appointed an advocate and solicitor to be his proxy who had duly lodged the requisite proxy form at the AGM, but the plaintiff's proxy was excluded from the AGM on the ground that the proxy form had not been deposited within the requisite time period. It was contended that the exclusion of the plaintiff's proxy and the rejection of the proxy form was wrong in law and an abuse of the powers of the second to seventh defendants as the first defendant's articles of association did not impose a time limit for the deposit of proxy forms. Thus it was contended that the AGM should be declared null and void and all resolutions passed thereat be set aside. On behalf of the defendants it was argued that the exclusion of the plaintiff's proxy was a mere irregularity which has not occasioned substantial injustice and was curable under s 355 of the Companies Act 1965 ('the Act').

In the defendants' application to discharge the injunctions, it was argued firstly, that there had been unreasonable delay on the plaintiff's part in applying for the injunctions as the notice calling for the injuncted EGM had been issued on 3 January 1991 but it was not until 24 January 1991 that the plaintiff's application was made. Secondly, it was submitted that the general indorsement in the plaintiff's writ did not disclose any reasonable cause of action but merely set out the prayers for various reliefs. Thirdly, it was submitted that ex parte procedure adopted by the plaintiff in obtaining the injunctions was inappropriate in the circumstances. The plaintiff contended that on the facts of the case, speed and secrecy were essential in applying for the injunctions because if the defendants had notice of the intended application, they might have brought forward the date of implementation of the proposed resolutions. Fourthly, it was submitted by the defendants that there was non-disclosure of material fact relating to two earlier suits before another judge involving the same parties. Finally the defendants challenged the locus standi of the plaintiff to maintain the action. It was contended that the plaintiff proceeded with the action based on sheer speculation and that he had failed to show how his interests would be affected.

Held, dismissing the applications:

(1) Delay on the part of the plaintiff in seeking an interlocutory injunction may be of importance when the balance of convenience is being determined. Although such delay may give rise to an inference that he has not suffered hardship or prejudice, such inference is easily open to rebuttal by direct evidence of the particular circumstances. In the present case, such delay as there was had been satisfactorily explained.

(2) The indorsement in the amended writ of summons did disclose a cause of action. The lengthy affidavit of the plaintiff filed in support of the application pursuant to which the injunctions had been granted had identified a legal right sufficient to give rise to a justiciable cause of action.

(3) The ex parte procedure will only be appropriate either where the delay occasioned by notifying the defendant may cause to the plaintiff irreparable damage, or where secrecy is essential. In the instant case, given the acrimony generated by the disputes between the parties, the plaintiff's apprehensions about proceeding inter partes or even on the basis of an opposed ex parte application were not unjustified.

(4) The non-disclosure alleged related to a material fact but it was not so severe that had it been disclosed the court would have declined to intervene by way of ex parte interlocutory injunctive relief. There is no absolute right to have an ex parte order obtained without due disclosure set aside: there is a discretion in the court whether to do so or not.

(5) A member of a company has the right to bring an action for a declaration that an alteration of the company's articles is void and of no effect. The plaintiff as an individual member was entitled to maintain the present proceedings and there was no need for him to sue in a representative capacity. The rule as to representative proceedings embodied in O 15 r 12(1) of the Rules of the High Court 1980 should be treated as being not a rigid matter of principle but a flexible rule of convenience in the administration of justice and should be applied, not in any strict or rigorous sense, but according to its wide and permissible scope.

(6) The right of a member of a company to vote by proxy has been conferred by s 149(1) of the Act. The effect of the subsection is to give the right to appoint proxies to any member who is entitled to vote at company meetings. From the words 'whether a member or not' used in the subsection, it is obvious that the proxy may or may not be a member. Hence art 51, which required the proxy to be a member of the company, sought to contract out of the provisions of the subsection and was therefore void and of no effect.

(7) The right to vote is one of a member's fundamental rights. Excluding the proxy and thus preventing the plaintiff from exercising his statutory right to vote was not a mere procedural irregularity curable by the majority but an illegality since it was an abuse of power or oppression on the minority which vitiated and

A therefore rendered null and void the AGM and all resolutions passed thereat. In the circumstances, there could be no recourse to the validation provisions of either s 355(1) or s 355(3) of the Act.

(8) The word 'proceeding' in s 355(1) of the Act should not be confined solely to legal proceedings but should extend to all proceedings at company meetings provided that they are required to be held under the Act.

B

[Bahasa Malaysia summary

C Plaintif ialah pemegang saham berdaftar saham biasa dalam defendan pertama. Defendan kedua hingga ketujuh adalah pengarah dan pemegang saham defendan pertama. Plaintif telah mendapat tiga injunksi interlokutori ex parte ('injunksi itu') menahan defendan pertama daripada meneruskan atau mengendalikan mesyuarat agung luar biasa yang dijadualkan berlangsung pada 31 Januari 1991 ('mesyuarat luar D biasa itu') atau sebarang penangguhan mesyuarat itu yang telah dipanggil dengan tujuan meminda perkara 56 perkara-perkara persatuannya supaya mengenakan satu kelayakan memegang saham ke atas pengarah dan menahan defendan pertama hingga ketujuh daripada melaksanakan dan/atau menggunakan kuasa mereka untuk menguat-E kuasakan ketetapan yang tertentu yang telah diluluskan pada mesyuarat agung tahunan ke42 defendan pertama yang dilangsungkan pada 21 Januari 1991 ('mesyuarat tahunan itu'). Defendan telah membuat permohonan ini untuk membatalkan injunksi itu.

Dalam pengindorsan pada writ di dalam tindakan ini yang difailkan pada 23 Januari 1991, plaintif mendakwa telah memulakan tindakan F ini bagi pihak beliau sendiri dan pemegang saham defendan pertama yang lain kecuali defendan kedua hingga ketujuh. Pemanggilan mesyuarat luar biasa itu, di mana dicadangkan meluluskan ketetapan meminda perkara 56 yang tersebut dahulu, dikatakan adalah penyalahgunaan kuasa defendan kedua hingga ketujuh sebagai pengarah G defendan pertama, adalah bukan untuk faedah defendan pertama, dan adalah fraud ke atas pemegang saham minoriti defendan pertama. Tujuan tunggal pelulusan ketetapan itu dikatakan adalah untuk mengekalkan penguasaan defendan kedua hingga ketujuh atas defendan pertama. Tentang mesyuarat tahunan itu, telah dikatakan dengan nyata di dalam notis memanggil mesyuarat tahunan itu bahawa semua H borang proksi harus diserahkan di pejabat berdaftar defendan pertama sekurang-kurangnya 48 jam sebelum mesyuarat tahunan itu dilangsungkan. Plaintif telah melantik seorang peguambela dan peguamcara untuk menjadi proksi beliau yang telah mengemukakan borang proksi yang diperlukan di mesyuarat tahunan itu, tetapi proksi plaintif telah I tidak dibenarkan menyertai mesyuarat tahunan itu atas alasan bahawa borang proksi tidak diserahkan dalam masa yang ditetapkan. Telah dihujahkan bahawa penafian penyertaan proksi plaintif dan penolakan borang proksi itu adalah salah dari segi undang-undang dan satu penyalahgunaan kuasa defendan kedua hingga ketujuh kerana perkara-perkara persatuan defendan pertama tidak mengenakan had masa

bagi penyerahan borang proksi. Dengan demikian telah dihujahkan bahawa mesyuarat tahunan itu harus diisytiharkan batal dan tak sah dan semua ketetapan yang diluluskan di mesyuarat itu diketepikan. Bagi pihak defendan telah dihujahkan bahawa penafian penyertaan proksi plaintif adalah hanya kejadian luar aturan yang tidak membawa ketidakadilan substansial dan boleh diperbaiki di bawah s 355 Akta Syarikat 1965 ('Akta itu').

Di dalam permohonan defendan untuk membatalkan injunksi itu, telah dihujahkan pertamanya, bahawa terdapat kelengahan yang tidak munasabah pada bahagian plaintif dalam memohon injunksi itu kerana notis memanggil mesyuarat luar biasa yang terlibat dalam injunksi itu telah dikeluarkan pada 3 Januari 1991 tetapi permohonan plaintif dibuat hanya pada 24 Januari 1991. Keduanya, telah dihujahkan bahawa pengindorsan am dalam writ plaintif tidak mendedahkan sebarang kausa tindakan yang munasabah tetapi hanya menyatakan permohonan bagi berbagai-bagi relief. Ketiganya, telah dihujahkan bahawa prosedur ex parte yang diambil oleh plaintif dalam mendapatkan injunksi itu tidak sesuai dalam keadaan begitu. Plaintif berhujah bahawa mengikut fakta kes ini, kelajuan dan kerahsiaan adalah perlu dalam memohon injunksi itu kerana jika defendan mempunyai notis permohonan yang dicadangkan, mereka mungkin akan mempercepatkan tarikh pelaksanaan ketetapan yang dicadangkan. Keempatnya, telah dihujahkan oleh defendan bahawa terdapat ketakdedahan fakta material berhubung dengan dua guaman yang lebih awal di hadapan hakim yang lain melibatkan pihak-pihak yang sama. Akhirnya, defendan mencabar locus standi plaintif untuk mempertahankan tindakan itu. Telah dihujahkan bahawa plaintif meneruskan tindakan itu berdasarkan tekaan semata-mata dan bahawa dia gagal menunjukkan bagaimana kepentingannya akan terlibat.

Diputuskan, menolak permohonan itu:

(1) Kelengahan pada bahagian plaintif dalam memohon injunksi interlokutori boleh jadi penting apabila imbangan kemudahan sedang diputuskan. Walaupun kelengahan semacam itu boleh menimbulkan satu inferens bahawa dia tidak mengalami kesusahan atau mudarat, inferens semacam itu boleh dipatahkan dengan senang melalui keterangan langsung tentang keadaan tertentu. Dalam kes sekarang ini, kelengahan semacam yang terjadi telah dijelaskan dengan sempurna.

(2) Pengindorsan dalam writ saman yang dipinda mendedahkan suatu kausa tindakan. Afidavit plaintif yang panjang yang difailkan bagi menyokong permohonan itu dalam mana injunksi itu telah dibenarkan telah mengenal pasti satu hak undang-undang yang cukup untuk menimbulkan satu kausa tindakan yang boleh diadili.

(3) Prosedur ex parte adalah sesuai hanya di mana kelengahan yang disebabkan oleh pemberian notis kepada defendan mungkin mendatangkan plaintif kerugian yang tidak dapat diganti, ataupun di mana kerahsiaan adalah perlu. Dalam kes ini, memandangkan kesengitan yang ditimbulkan oleh pertikaian antara pihak-pihak

A berkenaan, kebimbangan plaintif tentang meneruskan tindakannya secara inter partes ataupun berdasarkan satu permohonan ex parte yang ditentang bukanlah tidak berasas.

(4) Ketakdedahan yang dikatakan itu berhubung dengan fakta material tetapi ia bukanlah begitu teruk sehinggakan jika ia telah didedahkan mahkamah akan enggan bercampur tangan melalui pemberian relief injunksi interlokutori ex parte. Tiada hak mutlak mendapat pengetepian perintah ex parte yang diperolehi tanpa pendedahan sepatutnya: mahkamah mempunyai budi bicara sama ada membuat begitu atau tidak.

(5) Seseorang ahli sebuah syarikat mempunyai hak membawa tindakan untuk mendapat deklarasi bahawa pemindaan perkara syarikat itu adalah terbatal dan tidak berkesan. Plaintif sebagai ahli individu berhak mempertahankan prosiding sekarang ini dan tidak perlu baginya untuk mendakwa atas sifat wakil. Rukun tentang prosiding wakilan yang termaktub di dalam A 15 k 12(1) Kaedah-Kaedah Mahkamah Tinggi 1980 seharusnya diperlakukan sebagai bukan satu perkara prinsip yang tegar tetapi satu rukun kemudahan yang fleksibel dalam pelaksanaan keadilan dan seharusnya dipakai, bukan dalam maksud yang ketat atau rapi, tetapi mengikut skopnya yang luas dan yang dibenarkan.

(6) Hak seseorang ahli sebuah syarikat untuk mengundi melalui proksi diberi oleh s 149(1) Akta itu. Kesan subseksyen itu ialah pemberian hak melantik proksi kepada sebarang ahli yang berhak mengundi di mesyuarat syarikat. Dari perkataan 'whether a member or not' yang digunakan dalam subseksyen itu, jelas bahawa proksi boleh jadi seorang ahli atau sebaliknya. Oleh kerana itu perkara 51, yang memerlukan proksi menjadi seorang ahli syarikat itu, mencuba mengikat kontrak untuk mengetepikan peruntukan subseksyen itu dan dengan demikian adalah terbatal dan tidak berkesan.

(7) Hak untuk mengundi ialah satu daripada hak asasi seseorang ahli. Penafian penyertaan proksi itu dan oleh itu pencegahan plaintif daripada menggunakan hak statutorinya untuk mengundi bukanlah hanya kejadian luar aturan prosedur yang boleh diperbaiki oleh majoriti tetapi ialah kepenyalahan undang-undang kerana ia adalah satu penyalahgunaan kuasa ataupun penindasan minoriti yang menjadikan mesyuarat tahunan itu serta kesemua ketetapan yang diluluskan dalamnya terbatal dan tak sah. Dalam keadaan begitu, tidak ada jalan keluar dengan menggunakan peruntukan pengesahan dalam s 355(1) atau pun s 355(3) Akta itu.

(8) Perkataan 'proceeding' dalam s 355(1) Akta itu seharusnya tidak dihadkan hanya kepada prosiding undang-undang tetapi harus dilanjutkan untuk meliputi semua prosiding di mesyuarat syarikat asalkan prosiding itu perlu dilangsungkan di bawah Akta itu.]

Notes

For cases on interlocutory injunction, particularly delay in application, non-disclosure of material facts and discharge thereof, see 2 *Mallal's Digest* (4th Ed) paras 1083, 1096 and 1097–1100.

For cases on alteration of articles of association, see 3 *Mallal's Digest* (4th Ed) paras 10–12.
For a case on rejection of proxies, see 3 *Mallal's Digest* (4th Ed) para 138.

Cases referred to

1 *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504; [1975] AC 396; [1975] 2 WLR 316 (folld)
2 *Ware v Regent's Canal Co* (1858) 44 ER 1250 (folld)
3 *Coles v Sims* (1854) 43 ER 768 (refd)
4 *Utusan Melayu (Malaysia) Bhd & Anor v Chan Tse Yuen* [1989] 1 MLJ 185 (refd)
5 *Bates v Lord Hailsham of St Marylebone* [1972] 1 WLR 1373; [1972] 3 All ER 1019 (folld)
6 *Hong Leong Holdings Ltd v Sunbird (Pte) Ltd* [1990] 3 MLJ 65 (refd)
7 *Dormeuil Freres SA & Anor v Nicolian International Textiles Ltd* [1988] 3 All ER 197; [1988] 1 WLR 1362 (folld)
8 *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 (folld)
9 *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324; [1958] 3 WLR 404; [1958] 3 All ER 66 (refd)
10 *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 All ER 437 (refd)
11 *Edwards v Halliwell* [1950] 2 All ER 1064; [1950] WN 537 (refd)
12 *Baillie v Oriental Telephone and Electric Co Ltd* [1915] 1 Ch 503 (refd)
13 *John v Rees* [1969] 2 All ER 274; [1969] 2 WLR 1294 (folld)
14 *Pender v Lushington* (1877) 6 Ch D 70 (refd)
15 *Lee Eng Hock & Ors v Malay–Siamese Prospecting Co Ltd* [1933–34] FMSLR 350 (refd)
16 *ANZ Nominees Ltd v Allied Resources Corp Ltd* (1984) 2 ACLC 783 (refd)
17 *Harben v Phillips* (1883) 23 Ch D 14 (refd)
18 *Australian Hydrocarbons NL v Green* (1985) 10 ACLR 72 (distd)
19 *Omega Estates Pty Ltd v Ganke* [1963] NSWR 1416 (refd)
20 *Langton v Forsayth Mineral Exploration NL* (1975) 1 ACLR 227 (refd)
21 *Re Compaction Systems Pty Ltd* (1976) 2 ACLR 135; [1976] 2 NSWLR 477 (refd)
22 *Re Broadway Motors Holdings Pty Ltd (in lig)* (1986) 4 ACLC 598; (1986) 6 NSWLR 45; (1986) 11 ACLR 495 (refd)
23 *See Nyuk Fong & Ors v PanGlobal Equities Bhd* [1991] 1 MLJ 152 (refd)
24 *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1992] 1 MLJ 487 (refd)

Legislation referred to

Companies Act 1965 ss 149(1), 355(1), (3)
Rules of the High Court 1980 O 15 r 12(1)
Uniform Companies Act 1961 [Aust] s 366(1)

A *Loh Siew Cheang, Ranjit Singh, Aggie PL Chew* and *Khoo Gaik Tee (Cheang & Ariff)* for the plaintiff.

R Manecksha (Ong & Manecksha) for the first defendant.

K Balasundaram (Balasundaram & Co) for the second, third, sixth and seventh defendants.

B

Edgar Joseph Jr J: There were two applications before the court to discharge three ex parte interlocutory injunctions ('the injunctions') obtained by the plaintiff, the registered shareholder of ordinary shares amounting to 5.37% of the issued and paid-up capital of the first defendant, Thean Seng & Co Sdn Bhd ('TSS'), the effect of which was to restrain TSS, its C servants or agents, until further order, from proceeding with or holding its extraordinary general meeting ('EGM') scheduled for 31 January 1991 or any adjournment thereof which had been called for the purpose of altering art 56 of its articles of association, so as to impose a share qualification requirement on directors and to restrain TSS and also the second to the D seventh defendants, who are the directors of TSS, until further order, from implementing and/or exercising their powers to effect certain resolutions, including resolutions adopting the directors' report and audited accounts for the year ended 30 June 1990 together with the auditors' report thereon, passed at the 42nd annual general meeting of TSS held on 21 January 1991.

E In the indorsement to the writ herein though not in the title to the action from which the present applications arose, the plaintiff claimed that he was suing for and on behalf of himself and all other shareholders of TSS other than the second to the seventh defendants herein who are also shareholders of TSS.

F I must now introduce the dramatis personnae in the case. TSS is a private limited company incorporated in Malaysia. It has an authorized share capital of $2m divided into 200,000 ordinary shares of $100 each, out of which 12,891 ordinary shares have been issued and paid up.

The shareholders of TSS and their respective shareholdings as at 29 December 1989 were as follows:

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Shareholders	Shareholdings
Chow Chee Chor	506
Chow Ho Heang	105
Dragon Enterprise Sdn Bhd	6,513
H Goh Seong Kay	150
Gooi Hoay Chooi	278
Gui Hoay Seng	134
Gui Kin Hai	300
Kim Co Sdn Bhd	4,055
Lau Mei Aie	52
I Lim Hean Pin	693
Moey Hoong Goon @ Moey Hoong Yoon	53
Estate of Moey Hoon Kee	52
	12,891

The second and the third defendants own 50% of the shares of Kim Co Sdn Bhd and together with one Datin Lim Siew Khim, form the majority on the board of directors of Kim Co Sdn Bhd. The secretaries of Kim Co Sdn Bhd, namely, Lim Chin Kooi and Lim Cheng Par, are also the secretaries of TSS. I have already noted that the second to the seventh defendants are and were at all material times to this suit the directors of TSS. The fourth and the fifth defendants are and were at all material times shareholders of TSS.

Dragon Enterprise Sdn Bhd ('Dragon') is the majority and controlling shareholder of TSS, it being the registered proprietor of approximately 50.42% of the total issued and paid-up capital of TSS.

BH Low Holdings Sdn Bhd ('BHL') is in turn the majority and controlling shareholder of Dragon, it being the registered proprietor of approximately 51% of the issued and paid-up capital of Dragon. The majority shareholder of BHL is Tan Guan Sooi.

The directors of BHL are Tan Guan Sooi, Tan Guan Cheng and the sixth defendant, Ng Kweng Chew. The directors of Dragon are Tan Guan Sooi, Tan Guan Cheng, the sixth and the seventh defendants. The common personalities in BHL and Dragon are thus Tan Guan Cheng and the sixth defendant. The common personalities in Dragon and TSS are thus the sixth and the seventh defendants.

The plaintiff alleges that the second to the seventh defendants and one Tan Guan Cheng are aligned to one another and together these persons hold and control the management of BHL, Dragon and TSS.

The history of the matter which called for the consideration of the court may be shortly stated thuswise:

Early in 1989, serious dissensions arose between Tan Guan Eng on the one hand, and Tan Guan Cheng and the sixth defendant on the other, regarding the manner in which the affairs of BHL were being administered.

On 5 April 1989 notice was sent out by the secretary of BHL Gooi Seng Hui, of BHL's EGM requisitioned by a shareholder Tan Guan Eng, and scheduled for 13 May 1989, its business being to remove Ng Kweng Hee and Tan Guan Cheng as directors of BHL and to appoint Teh King Beng, Lim Eng Kim and Lim Chin Chong as new directors.

On 12 May 1989, a notice was also sent out by the secretary of Dragon Gooi Seng Hui, of Dragon's EGM scheduled for 20 May 1989, its business being to remove Ng Kweng Hee, Ng Kweng Chew and Tan Guan Cheng as directors of Dragon and to appoint in their place Ong Peng Yeow and Tan Keng Kooi.

On 13 May 1989, there was held the EGM of BHL, requisitioned by Tan Guan Eng, to remove Ng Kweng Hee and Tan Guan Cheng as directors of BHL and to appoint three other directors due to differences arising between the parties. The EGM was terminated by the Chairman Ng Kweng Hee. However, only the proxies of Tan Guan Eng remained and the EGM continued. The three other directors were appointed at the continued EGM, being Teh Kim Beng, Lim Eng Kim and Lim Chin Chong ('the new directors').

On 17 May 1989 a board meeting of BHL was held to appoint a corporate representative to attend Dragon's EGM which had been sched-

uled for 20 May 1989. Ng Kweng Hee was the chairman and he terminated the board meeting when the new directors attended the same. However, the board meeting nevertheless continued with the new directors in attendance and with Tan Guan Eng as chairman. Tan Guan Eng was appointed as corporate representative to attend Dragon's EGM which had been scheduled for 20 May 1989.

In the upshot, four civil suits were instituted ('the four suits') which, it was alleged by the plaintiff, and not denied by the defendants, revolved around a battle for the control of BHL, Dragon and ultimately of TSS.

More particularly, the parties to the suits and the reliefs sought therein were as follows:

Particulars

The first suit

Suit No	Plaintiff	Defendants
228–89	Tan Guan Eng	BHL, Ng Kweng Hee (the sixth defendant in the present suit) and Tan Guan Cheng

That suit was commenced for the purpose of, inter alia, declaring the appointment of the new directors valid and to restrain the defendants therein from interfering with their appointment, function and duties. The plaintiff therein applied for, and did on 17 May 1989 obtain, an interlocutory injunction to that effect.

The second suit

Suit No	Plaintiff	Defendants
231–89	The new directors	BHL, Ng Kweng Hee (the sixth defendant in the present suit), Tan Guan Cheng, Gooi Seng Hooi and Dragon

That suit was commenced by the new directors for, inter alia, the purpose of restraining the defendants therein from excluding the new directors from acting as directors of BHL and to restrain the defendants therein from obstructing the implementation of resolutions passed by the board of BHL. The new directors then applied for, and did on 20 May 1989 obtain an interlocutory injunction to that effect.

The third suit

Originating Summons No	Plaintiff	Defendants
363–89	BHL, Ng Kweng Hee (the sixth defendant in the present suit), Ng Kweng Chew (the seventh defendant in the present suit) and Tan Guan Cheng.	Dragon and Tan Guan Eng

TSS applied for and obtained leave to intervene and be made a party to the suit pursuant to an order of court dated 16 August 1989.

That originating summons was commenced on 20 May 1989 to stop the EGM of Dragon which had been requisitioned on 12 April 1989 and was scheduled for 20 May 1989 ('the Dragon EGM') and to stop Tan Guan Eng from acting as corporate representative of BHL at the Dragon EGM. The business of the Dragon EGM was, inter alia, to remove the sixth and the seventh defendants in the present suit and the said Tan Guan Cheng as directors of Dragon. The plaintiffs applied for and did on 20 May 1989 obtain interlocutory injunction to that effect.

The fourth suit

Suit No	Plaintiff	Defendants
245–89	Ng Kweng Hee Sdn Bhd and Ng Pee King (shareholders of Dragon)	The new directors

That suit was commenced also on 20 May 1989 to declare the appointments of the new directors as directors of BHL null and void and to restrain them from acting or holding themselves out as directors of BHL. TSS applied for, and obtained leave, to intervene in and be made a party to the proceedings pursuant to an order of court dated 2 October 1989.

On 25 October 1989, Wan Adnan J made an order for consolidation of the four suits. On 11 January 1990, Wan Adnan J heard submissions by counsel in the consolidated actions and reserved his judgment. On 19 February 1990 while the judgment of Wan Adnan J was still pending, the secretaries of TSS had given notice of its EGM scheduled for 8 March 1990, its business being to enlarge its paid-up capital by declaring a rights issue.

It was said that the sole purpose of declaring the rights issue was to dilute the equity of Dragon in TSS from that of a majority shareholder to that of a minority shareholder thus reducing the control of BHL, and consequently of Tan Guan Sooi, over TSS and so to perpetuate the control of Tan Guan Cheng and the second to seventh defendants.

On 6 March 1990, the plaintiff in the present suit and Tan Guan Sooi commenced Civil Suit No 73/90 against Ng Kweng Hee and ten others for, inter alia, a declaration that the proposed rights issue by TSS was for an improper purpose and therefore not bona fide and for an injunction to restrain the passing of the proposed resolution for a rights issue. On the same day — 6 March 1990 — ex parte interlocutory injunctions were granted by this court against Ng Kweng Hee and ten others (including TSS) restraining them from holding TSS's EGM on 8 March 1990 and from enlarging the paid-up capital of TSS.

An application by the defendants to dissolve those injunctions was dismissed by this court for reasons which appear in its judgment reported in [1992] 1 MLJ 487 under the name *Tan Guan Eng & Anor v Ng Kweng Hee & Ors.*

On 6 March 1990, the board meeting of Dragon was held to appoint Dragon's representative to attend TSS's EGM on 8 March 1990.

On 7 March 1990, for reasons appearing in his judgment reported in [1991] 3 CLJ 1873 under the name *Tan Guan Eng @ Tan Guan Sooi v BH Low Holdings Sdn Bhd & 2 Ors*, Wan Adnan J decided the consolidated action as follows:

(a) in the first suit, that the appointment of the new directors as directors of BHL was lawful and that the defendants therein be restrained from interfering with the appointment, functions and duties of the new directors.
(b) in the second suit, that no decision was to be made on the suit proper.
(c) in the third suit, that it be dismissed and accordingly the interlocutory injunction obtained therein be set aside.
(d) in the fourth suit, that it be dismissed with costs.

On 4 April 1990, upon the application of the defeated parties, Wan Adnan J granted a stay of execution of the various orders made by him pending the determination of an appeal to the Supreme Court from the same.

On 22 October 1990, by circular resolution the second to seventh defendants as directors of TSS approved the following transfers of shares:

Transferor	Transferee	No of shares
Lau Mei Aie	Datuk Ong Hoo Kim	3
Lau Mei Aie	Ong Gim Huat	3
Lau Mei Aie	Ng Kweng Chew	2
Lau Mei Aie	Ng Kweng Hee	2

On 15 November 1990 notice was given of the EGM of TSS scheduled for 3 December 1990, to fix the shareholding qualification of a director at one share to the nominal value of $100 per share pursuant to art 56 of the articles [of association] of TSS.

In summary, it was said with regard to the proposal to pass the resolution imposing a share qualification for directors and the passing of the circular resolution approving the transfer of shares aforesaid, that these were tactical moves designed solely to perpetuate the second to seventh defendants' control over TSS, was an abuse of the powers of the second to seventh defendants and a fraud on the minority shareholders of TSS.

On 3 December 1990, the plaintiff herein commenced Civil Suit No 435/90 against the defendants herein and upon his application, on the same day, Mohamed Dzaiddin J granted an interlocutory injunction restraining the holding of the EGM to be held on 3 December 1990 and three other injunctions which in effect restrained Ong Hoo Kim, Ong Gim Huat, Ng Kweng Chew and Ng Kweng Hee from acting as directors of TSS.

On 21 December 1990, the defendants' application to set aside the ex parte injunction obtained on 3 December 1990 was heard. Lim Hean Pin, the plaintiff herein, through counsel Mr Ranjit Singh conceded that three of the four interlocutory injunctions should be dissolved. However, the application to dissolve the remaining interlocutory injunction restraining the holding of the EGM was contested. In the event, Mohamed Dzaiddin J dissolved that interlocutory injunction and ordered the EGM to be held on 24 December 1990 at 10am.

On 22 December 1990, the plaintiff herein filed a fresh suit to stop the EGM to impose a share qualification on directors scheduled for 24 December 1990. Counsel for the parties, namely, Mr Ranjit Singh for the plaintiff and Mr Rumi Manecksha for the defendants appeared before Mohamed Dzaiddin J at approximately 12.30pm on that day. The matter was, however, adjourned to 24 December 1990 to allow the plaintiff to amend his writ of summons.

On 24 December 1990, the plaintiff herein filed an amended writ of summons and an application for an interlocutory injunction (supported by a certificate of urgency) to stop the EGM to impose a share qualification on directors which was scheduled for 10am on the same day. However, counsel could only be heard at 10.20am that day, by which time the EGM had been held and the resolution concerned pass. In the result, the application was withdrawn.

On 3 January 1991, while the appeal against the judgment of Wan Adnan J was still pending, the secretaries of TSS gave notice of its 42nd AGM ('the TSS AGM') scheduled for 21 January 1991 and its EGM scheduled for 31 January 1991 ('the TSS EGM') to alter art 56 of the articles of association of TSS by way of a special resolution so as to impose the shareholding qualification of directors as an article of TSS in the following manner:

> That the shareholding qualification of director shall be the holding in his own right of at least one share to the nominal value of $100 per share.

It was said that the second to seventh defendants herein, not satisfied that a resolution had been passed on 24 December 1990 imposing a share qualification on directors, were now seeking to further consolidate their position by entrenching the share qualification requirement as an article under the articles of association of TSS and so seek to pass the resolution to alter art 56 thus ensuring that any attempt to change the shareholding qualification required of a director of TSS would have to be by way of a special resolution.

In amplification of this point, it was pointed out that Kim Co Sdn Bhd, owned approximately one-third the shares of TSS and was in the control of the second and third defendants. The second to seventh defendants were attempting to ensure that once the resolution altering art 56 was passed, any future attempt to alter it would fail unless Kim Co Sdn Bhd together with other shareholders of TSS voted to form a 75% majority — so it was urged.

It was therefore said that the calling of the TSS EGM scheduled for 31 January 1991 and the resolution intended to be passed thereat to alter art 56 of the articles of association of TSS aforesaid was an abuse of the powers of the second to seventh defendants as directors of TSS, was not for the benefit of TSS and was a fraud on the minority shareholders of TSS.

In their notice calling for the TSS AGM, the secretary had expressly stated that all proxy forms should be deposited at its registered office at least 48 hours before the said AGM. The plaintiff appointed Miss Khoo Gaik Tee or, failing her, Mr Ranjit Singh, both advocates and solicitors, to be his proxy.

On 11 January 1991, Tan Guan Eng commenced Civil Suit No 4/91 against BHL and its directors for, inter alia, an order that a receiver and manager to be appointed to manage the affairs of BHL until such time as a new board of directors was appointed on the grounds of serious and continuing disputes between directors of BHL.

On the same day, Tan Guan Eng and Ong Peng Yew commenced Civil Suit No 13/91 against Dragon and its directors for, inter alia, an order that a receiver and manager be appointed to manage the affairs of Dragon until such time as a new board of directors was appointed on the grounds of serious and continuing disputes between directors of Dragon.

On 21 January 1991, the plaintiff herein, through his solicitors Messrs Lim Kim Chuan & Co, submitted five sets of transfer forms to TSS for the transfer of shares (later rejected by its board as noted below) to the following persons:

Transferee	No of shares
Lim Eng Kim	1
Lim Chin Chong	1
Teh King Beng	1
Ang Chong Huat	1
Tan Guan Sooi	1

Also on 21 January 1991, the TSS AGM was duly held. Miss Khoo Gaik Tee duly lodged the requisite proxy form at the AGM but it was rejected on the ground that it had not been deposited within the requisite time period.

It was said that the second to seventh defendants had arbitrarily imposed this time condition without the consent of the shareholders. It was further said that the rejection of the proxy form was wrong in law and an abuse of the powers of the second to seventh defendants as the articles of association of TSS did not impose a time limit for the deposit of proxy forms.

It was also said that the passing of the directors' report and auditors' report at the TSS AGM held on 21 January 1991 was in contravention of s 169 of the Companies Act 1965 for the following reasons:

(1) the directors' report had failed to disclose that the ultimate holding company of TSS was in fact BHL but instead had named Dragon as the ultimate holding company of TSS and so was false and misleading;

(2) the directors' report had declared that the sixth defendant had an indirect interest over 6,513 shares in TSS. However, the majority shareholder of TSS was Dragon which owned approximately 6,513 shares in TSS; Dragon, in turn, being a subsidiary of BHL. In truth and in fact, the sixth defendant neither owned Dragon nor BHL, these being the parties directly and indirectly interested in the 6,513 shares. Consequently, contrary to what was alleged in the directors' report, the sixth defendant could lay no claim to any of the 6,513 shares;

(3) in the circumstances, the sixth defendant executed the directors' report, well knowing that its contents were false in material particulars and misleading;

(4) by virtue of the matters alleged in paras 1, 2 and 3 above, the auditors' report had failed to give a true and fair picture of the state of affairs of TSS; and
(5) the sixth defendant in purporting to act under the authority of s 169(16) of the Companies Act 1965, had falsely sworn to the truth and accuracy of the auditors' report knowing that the contents thereof did not give a true and fair picture of the affairs of TSS.

In summary, it was said, with regard to the TSS AGM held on 21 January 1991 that:

(i) it was null and void and all resolutions passed thereat, including the resolution adopting the directors' report and audited statement of accounts for the year ended 30 June 1990, together with the auditors' report thereon, should, accordingly, be set aside; and
(ii) that the act of the second to seventh defendants, in objecting to the proxy form lodged by the plaintiff was wrong in law and an abuse of their power as directors.

In summary, it was said with regard to the calling of the TSS EGM scheduled for 31 January 1991 at which it was intended to pass the resolution to alter art 56 of the articles of association of TSS aforesaid, that it was also an abuse of the powers of the second to seventh defendants as directors of TSS, was not for the benefit of TSS and was a fraud on the minority shareholders of TSS.

On 24 January 1991, the plaintiff herein commenced the suit herein against TSS, Ong Hoo Kim, Ong Gim Huat, Gooi Hoay Chooi, Gui Kin Hai, Ng Kweng Hee and Ng Kweng Chew to, inter alia, restrain them from implementing the resolutions of the TSS AGM held on 21 January 1991 and from holding the TSS EGM on 31 January 1991 to alter art 56 of the articles of association of TSS.

On 28 January 1991, this court did, upon the application of the plaintiff herein, grant the injunctions which the defendants had now sought to discharge.

On 31 January 1991 the solicitors for the plaintiff, M/s Lim Kim Chuan & Co, had been informed by the joint secretary of TSS Lim Cheng Par that its board of directors had rejected his five sets of application for transfer of shares aforesaid without giving any reason.

I must now direct my attention to the two applications to discharge the injunctions keeping in the forefront of my mind the following guidance offered by Lord Diplock in *American Cyanamid Co v Ethicon Ltd*[1] at p 504D:

> It is no part of the court's function at this stage of the litigation [that is, in considering a motion for the grant or discharge of an injunction, I interpolate] to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration.

I take firstly, the application by TSS to discharge the injunctions which, broadly stated, was on five grounds, namely: (1) delay, (2) no cause of action disclosed in the writ, (3) ex parte procedure wrong, (4) non-disclosure of material facts and (5) the absence of locus standi.

(1) *The delay point*

It was strongly argued that there had been unreasonable delay on the part of the plaintiff in applying for the injunctions given the fact that the notice calling for the injuncted EGM had been issued on 3 January 1991, and junior counsel for the plaintiff Mr Ranjit Singh had stated from the Bar that he had been instructed to apply for the injunctions some two weeks before he lodged his application on 24 January 1991, which was just one week before the date of the proposed EGM. In any event, it was argued that the solicitors for the plaintiff could easily have notified the solicitors for the defendants of the intended application to injunct the EGM so that there might at least have been an opposed ex parte application.

The point as to delay had not been raised in any of the affidavits filed on behalf of the defendants. However, leading counsel for the plaintiff, Mr Loh Siew Cheang, drew my attention to the following chronology of events which, according to him, showed that the plaintiff was not lacking in diligence.

First of all, he pointed out that the AGM of TSS had been held on 21 January 1991 and it was on that same day that Mr Ranjit Singh who had charge of the preparation of the paperwork in the present case had been informed that the plaintiff's proxy, Miss Khoo Gaik Tee, had been excluded from that AGM thus giving rise to another cause of action.

On that day too, Mr Ranjit Singh for the plaintiff had been instructed to join the two causes of action in one civil suit, namely, the suit out of which the present applications arise, being Civil Suit No 16/91. So, two days later, Mr Ranjit Singh had dispatched by courier, for filing at the Registry of the High Court, Penang, a writ of summons on which was indorsed the plaintiff's claim, and a summons-in-chambers supported by a certificate of urgency. Then, some five days later — that is to say on 28 January 1991 — an amended summons-in-chambers and an affidavit in support thereof affirmed by the plaintiff was also filed and it was on that very day that the injunctions, the subject of the present applications, had been granted by this court.

In the result, said counsel for the plaintiff, the time which elapsed between the date when the TSS AGM of 21 January 1991 (from which Miss Khoo Gaik Tee had been excluded) was held and the filing of the application for the injunctions was a period of a mere three days. If, on the other hand, one considered the time which elapsed between the receipt of instructions from the plaintiff to injunct the EGM of TSS of 31 January 1991 and the date when the writ of summons and summons-in-chambers were filed, the time lag was some 15 days.

Those being the facts I must now turn to the applicable law.

It is settled law that delay on the part of the plaintiff in seeking an interlocutory injunction 'may be calculated to throw considerable doubt upon the reality of his alleged injury' (per Lord Chelmsford LC in *Ware v Regent's Canal Co*[2] at p 1257 and hence may be of importance when the balance of convenience is being determined. But much will depend upon the particular circumstances of each case. In other words, the delay is often explicable by reference to other circumstances; for example, a plaintiff might have delayed the institution of proceedings because he wished to

obtain better means of providing his case (see *Coles v Sims*[3] at p 771). It follows, therefore, that delay on the part of a plaintiff, although it may give rise to an inference that he has not suffered hardship or prejudice, such inference is easily open to rebuttal by direct evidence of the particular circumstances. A

Applying the authorities cited to the case now before me, I found as a fact, that such delay as there was had been satisfactorily explained by counsel for the plaintiff and I need say nothing more about the point. B

(2) *No cause of action point*

It was submitted by counsel for TSS that at the time of the grant of the injunctions there was no statement of claim before the court and that the general indorsement in the writ did not disclose any reasonable cause of action against the defendants but merely set out prayers for various reliefs. In the result, it was said that the very first requirement for the grant of interlocutory injunctive relief, namely, that there was a serious question to be tried (per Lord Diplock in *American Cyanamid Co v Ethicon Ltd*[1]) had not been satisfied. C D

The general indorsement in the amended writ of summons in the present case was as follows:

> The plaintiff brings this action for himself and for and on behalf of all the other shareholders of the first defendant other than the defendants herein who are also shareholders of the first defendant in this action, the plaintiff claims for: E
>
> (i) a declaration that the act of refusal by the second to seventh defendants in objecting (to) the proxy [form] lodged by the plaintiff at the first defendant's 42nd annual general meeting is (was) wrongful in law and is (was) an abuse of their powers as directors;
> (ii) a declaration that the annual general meeting of the first defendant held on 21 January 1991 is (was) null and void and all resolutions passed thereto (should) be set aside accordingly; F
> (iii) an injunction against the first to seventh defendants from implementing and/or exercising their powers to effect the resolutions passed at the 42nd annual general meeting of the first defendant held on 21 January 1991 or any adjournment thereof; G
> (iv) a declaration that the extraordinary general meeting scheduled for 31 January 1991 and the resolution intended to be passed thereat to amend art 56 of the articles of association of the first defendant is (was) an abuse of the powers of the fourth and fifth defendants as directors of the first defendant company and is (was) not for the benefit of the first defendant company and is (was) a fraud on the minority shareholders of the first defendant company; H
> (v) an injunction against the first to seventh defendants whether by themselves, their servants or agents from proceeding with or holding the extraordinary general meeting of the first defendant scheduled on 31 January 1991 and from in any manner altering or amending the articles of association of the first defendant company; I
> (vi) damages for breach of duties;
> (vii) interest on damages;
> (viii) costs; and
> (ix) such further or other reliefs.

In my view, paras (i) and (iv) of the indorsement in the amended writ of summons did disclose a cause of action. In any event, the lengthy affidavit of the plaintiff affirmed on 28 January 1991 (encl 5) filed in support of the amended ex parte summons-in-chambers (encl 4) pursuant to which I had granted the injunctions had identified a legal right sufficient to give rise to a justiciable cause of action (see *Utusan Melayu (Malaysia) Bhd & Anor v Chan Tse Yuen*[4]). This ground therefore failed.

(3) *Was the plaintiff justified in proceeding ex parte?*

It was submitted by counsel for TSS that given the circumstances of this case it was not appropriate for the plaintiff to have applied ex parte for the injunctions.

I recognize that ex parte procedure will only be appropriate either where the delay occasioned by notifying the defendant may cause to the plaintiff irreparable damage, or where secrecy is essential. So, for example, in *Bates v Lord Hailsham of St Marylebone*[5] Megarry J (as he then was) said: 'Ex parte injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion.'

On the other hand, it was submitted on behalf of the plaintiff that due to the very limited time between the receipt of instructions by his solicitors and the date when the EGM to be injuncted was to have been held, an inter partes application in a complex case such as this, entailing the likelihood of the defendants needing time to put up an affidavit in opposition, the application might not have been heard and determined until after the EGM was held and the resolutions concerned passed, in which case the stable door would have been shut after the horse had bolted. It was further submitted that given the facts of this case, speed and secrecy in applying for the injunctions were essential and that the case was akin to an application for a Mareva injunction because if notice had been given to the defendants of the intended application for the injunctions they might have brought forward the date of implementation of the proposed resolutions.

It seemed to me that given the acrimony generated by the disputes between the parties as appeared from the facts outlined above and what was alleged by counsel on both sides, but — I would interpolate — without in any way attempting to judge the rights or wrongs of those disputes at this stage because that must obviously await the final hearing, I was not prepared to hold that the plaintiff's apprehensions about proceeding inter partes or even on the basis of an opposed ex parte application, were unjustified. This ground accordingly failed.

(4) *The non-disclosure point*

The gist of the submission of counsel for TSS was that the two suits before Mohamed Dzaiddin J were most material to the application for the injunctions by the plaintiff because the parties in those suits were the same as the parties in the suit herein and this was recognized by the plaintiff himself for otherwise he would hardly have himself applied to consolidate those suits with the suit herein.

The important question which arises here is whether this court would have refused the application for the injunctions had it been apprised of the history of the proceedings before Mohamed Dzaiddin J. In other words, was the non-disclosure so severe that if it were disclosed this court would not have granted the injunctions? (See *Hong Leong Holdings Ltd v Sunbird (Pte) Ltd.*[6])

Now, the main relief prayed for in the two suits before Mohamed Dzaiddin J was an injunction restraining the directors of TSS (who are the second to seventh defendants in the present suit) from holding an EGM with a view to passing a resolution fixing the minimum share qualification for directors pursuant to art 56 of the memorandum and articles of association of TSS *whereas* the main relief prayed for in the suit herein and from which the present application arises is to restrain the second to seventh defendants from holding an EGM with a view to altering art 56 of the memorandum and articles of association of TSS by imposing a minimum share qualification for directors. At first glance this might appear to be a difference without a distinction. But reflection reveals that this is not so. If you alter the articles you are in effect rewriting the contract between the shareholders and the company *whereas* if you pass a resolution you do nothing of the sort. The second to seventh defendants as between themselves had, of course, the necessary three-quarters majority to pass the necessary special resolution to amend the articles of TSS.

But even more to the point is the chronology of events in the proceedings before Mohamed Dzaiddin J which showed that counsel for the plaintiff could not be heard until after the EGM was held on 24 December 1990, when the resolution fixing the directors' share qualification was passed.

In these circumstances, I accept that the non-disclosure related to a *material* fact but I do not consider that it was so *severe* that had it been disclosed I would have declined to intervene by way of ex parte interlocutory injunctive relief. In this context, I have in exercising my discretion also reminded myself of the current attitude of the courts when considering applications for discharging ex parte orders on the ground of non-disclosure. The relevant principles were enunciated by Sir Nicholas Browne-Wilkinson VC in *Dormeuil Freres SA & Anor v Nicolian International (Textiles) Ltd*[7] thuswise:

> I will deal first with the application to set aside the ex parte order. It is a basic principle, applicable to all ex parte applications, that a plaintiff seeking ex parte relief must make full disclosure to the court of all facts which are material to the exercise of the court's discretion whether or not to grant the relief. If such disclosure is not made by the plaintiff, the court may discharge the ex parte injunction on that ground alone. But if, in the circumstances existing when the matter comes before the court inter partes, justice requires an order either continuing the ex parte injunction or the grant of a fresh injunction, such an order can be made notwithstanding the earlier failure of the plaintiff to make such disclosure. Moreover, there is authority that, contrary to the law as it was originally laid down, there is no absolute right to have an ex parte order obtained without due disclosure set aside: *there is a discretion in the court whether to do so or not.* (Emphasis supplied.)

Accordingly, this ground also failed.

(5) *The locus standi point*

Counsel for TSS challenged the locus standi of the plaintiff to maintain the present proceedings. He pointed out that the plaintiff was merely speculating that the proposed amendment of art 56 of the memorandum and articles of association of TSS whereby a minimum share qualification was to be imposed on those who wished to be directors could affect third parties. Likewise, it was also pointed out that the plaintiff not only was alleging improper motives on the part of the second to seventh defendants based on sheer speculation but that he had failed to demonstrate the fundamental point as to how his own interests would be affected.

More particularly, counsel contended that he failed to see how the plaintiff could be affected by what goes on in BHL or Dragon in which the plaintiff had no interest but yet the plaintiff appeared to be holding a brief for a group in those companies. However, what came out from the plaintiff's affidavit, said counsel, was this: if the plaintiff is not allowed the injunctions a group of shareholders who he supports will not be able to gain control of TSS.

Counsel went on to explain that the proposed amendment of art 56 merely sought to restore the position under the original memorandum and articles of association of TSS which had imposed a share qualification on directors and as such it would also benefit and not prejudice the plaintiff who was in any case qualified to be a director. Counsel also asked what damage TSS would suffer if the injunctions were discharged.

In rounding up his arguments regarding this part of the case, counsel whilst conceding that all the suits hereinbefore mentioned were filed for control of TSS, contended that the proposed alteration of art 56 would not result in any damage to TSS or any prejudice to the plaintiff and so injunctive relief which is designed for the prevention of harm would not be appropriate. It was further contended that when two parties are contending for control of a company, then one party should not be permitted to raise issues of fraud and seek an injunction. It was also contended that the proposed alteration of art 56 was a logical and necessary step to give effect to the resolution passed at the EGM held on 24 December 1990, which the plaintiff had unsuccessfully attempted to stop.

In reply, counsel for the plaintiff submitted that the plaintiff's suits disclosed two causes of action: namely, one directed at the proposed TSS EGM of 31 January 1991 and the other directed at the TSS AGM of 21 January 1991 and these could be properly joined in one suit. He drew attention to the rule in *Foss v Harbottle*[8] which precludes a member from bringing an action to enforce a right belonging to his company and relied upon two of the exceptions thereto; namely, (1) where a minority member may commence a derivative action on behalf of a company if a fraud on the minority exists and (2) where the personal and individual rights of members have been invaded.

As regards the calling of the EGM concerned by the second to seventh defendants to alter art 56, it was said that they had not exercised their powers to do so bona fide and in the interest of TSS as a whole, but instead to secure some personal interest for the reasons hereinbefore mentioned.

Counsel also drew attention to the rule against conflict of interest where the persons concerned act as nominee directors of a parent company in its subsidiary companies. In such a situation the powers of such persons cannot be utilized to injure the parent company or for their own personal benefit (see *Scottish Co-operative Wholesale Society Ltd v Meyer*[9]).

Turning to the circumstances of the present case, he submitted that the directors common to BHL, Dragon and TSS, should not use their powers in Dragon or in TSS in such a way and for the purpose of fighting their adversary in BHL, and if they did so, which he said was the case here, they would be allowing their duty to conflict with their interest.

I note that in *Estmanco (Kilner House) Ltd v Greater London Council*[10] Sir Robert Megarry VC said at p 444: 'Now the question is how far authorities such as these on the validity of making alterations in the articles fit in with the rule in *Foss v Harbottle* ...'. In my view, the right of a member of a company to bring an action for a declaration that an alteration of the company's articles is void and of no effect falls within the exception which states that the rule in *Foss v Harbottle*[8] does not 'prevent an individual member from suing if the matter in respect of which he (is) suing (is) one which (can) validly be done or sanctioned, not by a simple majority of the members of the company ... but only by some special majority, as, for instance ... a special resolution duly passed as such'. (See *Edwards v Halliwell*[11] per Jenkins LJ at p 1067. See also the article by KW Wedderburn, 'Shareholders' Rights and the rule in *Foss v Harbottle*' [1957] CLJ 194, especially at pp 207–209.) Articles of association may be altered only by special resolution (see s 31 of the Companies Act 1965) and if the power of alteration has been exercised irregularly or improperly , it is not competent to a 'bare majority (to) say we will not allow any proceedings to be taken'. (See *Baillie v Oriental Telephone and Electric Co Ltd*[12] per Swinfen–Eady LJ at p 518. See also per Lord Cozens–Hardy MR at p 515.) Hence, the rule in *Foss v Harbottle*[8] is no bar to an action by an individual member impeaching an alteration of a company's articles of association.

Similarly, for the reasons I have just stated, I did not consider that there was anything in the point that the plaintiff had no locus standi to maintain the present proceedings, because although he had claimed by the indorsement in his writ that he was suing for and on behalf of himself and all other shareholders of TSS other than the second to seventh defendants herein who are shareholders of TSS, two shareholders of TSS, namely, Lau Mei Aie, holding 42 shares, and Gui Hoay Seng, holding 134 shares, had gone on affidavit to say that the plaintiff was not authorized in any way to bring this suit on their behalf. In my view, for the reasons stated the plaintiff as an individual member was entitled to maintain the present proceedings and there was no need for him to sue in a representative capacity.

In any event, the rule as to representative proceedings embodied in O 15 r 12(1) of the Rules of the High Court 1980 should be treated as being not a rigid matter of principle but a flexible rule of convenience in the administration of justice and should be applied, not in any strict or rigorous sense, but according to its wide and permissible scope (per Megarry J (as he then was) in *John v Rees*,[13] a case where there was a division of opinion between the plaintiff and those he claimed to represent).

A To round off this part of the case, the plaintiff had alleged that the power to alter art 56, if not restrained by injunction, will be exercised irregularly or improperly for the reasons hereinbefore mentioned. Whether or not he is correct in his contention can only be determined at the final hearing. It is therefore unnecessary for me to embark upon a complicated analysis of the plaintiff's causes of action as all I am concerned with at this stage, is the B title of the plaintiff to sue. Having thus directed myself I was satisfied that there was sufficient material for me to hold that the plaintiff had established a prima facie case that he is entitled to the relevant declarations claimed in the suit and that the suit falls within the proper boundaries of the exceptions to the rule in *Foss v Harbottle*.[8] Accordingly, the locus standi point also C failed.

I next turn to consider the application by the second, third, sixth and seventh defendants to discharge the injunctions.

(6) *The proxy point*

D As regards the TSS AGM of 21 January 1991, it was said that the plaintiff's proxy Miss Khoo Gaik Tee, an advocate and solicitor, had been wrongfully excluded. If so, there is clear authority for the proposition that ignoring a member's votes is not a mere irregularity which can be cured by the majority; it is an infringement of the member's personal rights in respect of which he can maintain a personal action (see *Pender v Lushington*[14] and *Lee* E *Eng Hock & Ors v Malay-Siamese Prospecting Co Ltd*[15] at p 352).

There was much argument as to whether or not the plaintiff's proxy Miss Khoo Gaik Tee had been wrongfully excluded from the TSS AGM held on 21 January 1991. It was, however, conceded by counsel for the second to seventh defendants, in my view quite rightly, that the ground upon which F the chairman had excluded the proxy — namely, that the proxy form had not been lodged in time — was wrong. However, it was argued that regard being had to the provisions of art 51 of the memorandum and articles of association of TSS which require that the proxy must be a member of the company and that Miss Khoo Gaik Tee, not being a member, was not qualified to be a proxy. Alternatively, it was argued that even if it was not G open to the second to seventh defendants to rely upon a ground for excluding Miss Khoo Gaik Tee, which had not been relied upon at the time of her exclusion, nevertheless, having regard to the case of *ANZ Nominees Ltd v Allied Resources Corp Ltd*,[16] her exclusion was a mere irregularity which had not occasioned substantial injustice and could be cured under the H provisions of s 355 of the Companies Act 1965 which read as follows:

> (1) No proceeding under this Act shall be invalidated by any defect irregularity or deficiency of notice or time unless the Court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by any order of the Court.
> (2) The Court may if it thinks fit make an order declaring that the proceeding I is valid notwithstanding any such irregularity or deficiency.
> (3) Without affecting the generality of subsection (1) and subsection (2) or of any other provision of this Act, where any omission defect error or irregularity (including the absence of a quorum at any meeting of the company or of the directors) has occurred in the management or administration of a

company whereby any breach of this Act has occurred, or whereby there has been default in the observance of the memorandum or articles of the company or whereby any proceedings at or in connection with any meeting of the company or of the directors thereof or any assemblage purporting to be such a meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency pursuant to section 257, the Court —

(a) may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission defect error or irregularity, or to validate any act matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission defect error or irregularity;
(b) shall before making any such order satisfy itself that such an order would not do injustice to the company or to any member or creditor thereof;
(c) where any such order is made, may give such ancillary or consequential directions as it thinks fit; and
(d) may determine what notice or summons is to be given to other persons of the intention to make any such application or of the intention to make such an order, and whether and how it should be given or served and whether it should be advertised in any newspaper.

Counsel for the second to seventh defendants went on to say why Miss Khoo Gaik Tee's exclusion, even if wrongful, did not vitiate the AGM or the resolutions passed thereat, in particular, the resolution passing the directors' and auditors' reports for the year ended 30 June 1990 which had been impugned by the plaintiff as containing statements which were false in material particulars for the reasons hereinbefore mentioned. It was said that Miss Gaik Tee's principal, the plaintiff only held 693 shares of the total of 12,891 shares, being the issued share capital of TSS, so that if Miss Khoo Gaik Tee had not been excluded and a poll had been taken upon the resolution concerned and she had voted against it, that would have made no difference to the result.

As regards the art 51 point, I consider that being at the material time an advocate and solicitor it is plainly overridden by s 149(1) of the Companies Act 1965 which reads as follows:

A member of a company entitled to attend and vote at a meeting of the company, or at a meeting of any class of members of the company, shall be entitled to appoint another person or persons (whether a member or not) as his proxy to attend and vote instead of the member at the meeting and a proxy appointed to attend and vote instead of a member shall also have the same right as the member to speak at the meeting, but unless the articles otherwise provide —

(a) ...
(b) a member shall not be entitled to appoint a person who is not a member as his proxy unless that person is an advocate, an approved company auditor or a person approved by the Registrar in a particular case;

...

I say no because at common law the position was that there was no right to appoint a proxy and voting at meetings had to be in person (see *Harben v*

A *Phillips*[17]). The right of a member to vote by proxy has, however, been conferred by s 149(1) of the Companies Act 1965. The effect of the subsection is, in my opinion, to give the right to appoint proxies to any member who is entitled to attend and vote at meetings of the company, or at a meeting of any class of members of the company. The proxy may or may not be a member; this is obvious from the bracketed words in para 1 B of the subsection 'whether a member or not'. Accordingly, art 51 seeks to contract out of the provisions of the subsection and is therefore void and of no effect (see *ANZ Nominees Ltd v Allied Resources Corp Ltd & Ors*[16] at p 789).

As regards the s 355(1) point, namely, that even if the proxy Miss Khoo C Gaik Tee had been wrongfully excluded from the meeting, the error in the circumstances was a mere irregularity which had occasioned no substantial injustice, I did not consider the case of *Australian Hydrocarbons NL v Green*[18] at pp 785–786 to be applicable because it was decided upon s 539 (NSW) Companies Act which expressly provides that 'proceeding' is not confined to legal proceedings, its effect being that the court has power to D validate *any* irregular proceedings and *any* act which would otherwise be a contravention of the memorandum or articles of association. An AGM would thus be a proceeding within s 539(3). There is, however, no equivalent provision in our Companies Act 1965.

At first blush, therefore, I had thought that an AGM was not a proceed- E ing within s 355(1) of our Companies Act 1965 because the word 'proceeding' therein should be restricted to proceedings in court of a curial nature and so inapplicable to proceedings at company meetings with the result that the 'no substantial injustice' clause could only be invoked in respect of proceedings in court (see *Omega Estates Pty Ltd v Ganke*[19] at p 1424, a case decided on the old Australian Act of 1961, s 366).

F But reflection reveals that the opening words of s 355(1), 'No proceeding under this Act ...' are widely drawn and should not be confined solely to legal proceedings but should extend to all proceedings at company meetings provided they are required to be held under the Act.

I am now fortified in this view by cases on the interpretation of s 366(1) G of the Uniform Companies Act 1961, which is in pari materia with s 355(1) of our Act. These cases show that the meaning and ambit of the word 'proceedings' is not restricted to legal proceedings but extends to both curial and non-curial proceedings (see *Langton v Forsayth Mineral Exploration NL*[20] per Mahoney JA at p 236; *Re Compaction Systems Pty Ltd*[21] at p 305 and *Re Broadway Motors Holdings Pty Ltd (in liq)*[22]).

H However, in respect of any omission, defect or irregularity in the management or administration of a company in contravention of the Companies Act 1965 s 355(3) thereof is manifestly clear and empowers the court, in certain circumstances, on its own motion or on application, to make a validation order provided no injustice is done to the company or to any I member or creditor thereof. The next question which arises is whether wrongfully excluding the proxy and thus preventing the plaintiff from exercising his statutory right to vote conferred under s 148(1) of the Companies Act 1965 was a mere omission, error or an irregularity capable of being cured under s 355(1) or s 355(3) (*See Nyuk Fung & Ors v*

PanGlobal Equities Bhd[23] where the principles for the applicability of s 355(3) are discussed). A

In my view, excluding the proxy and thus preventing the plaintiff from exercising his statutory right to vote was not a mere procedural irregularity curable by the majority but an illegality since it was an abuse of power or oppression on the minority which vitiated and therefore rendered null and void the AGM and all resolutions passed thereat. B

Looking back, I would emphasize that the right to vote is one of a member's fundamental rights for it is by his vote that he gets his voice heard in the company's affairs. That being so, the submission that even if the proxy Miss Khoo Gaik Tee had not been excluded and had voted at the AGM, the result of the poll would have been the same, having regard to the fact that her principal the plaintiff was only a minor shareholder, is clearly untenable. C

In these circumstances, the AGM concerned and all resolutions passed thereat being a nullity and therefore incurably illegal, recourse to the validation provisions of either s 355(1) or s 355(3) would be an act of supreme futility. Accordingly, the proxy point also failed. D

That, however, is not the end of the matter because in considering the application for discharge of the injunctions I also had to have due regard to the questions whether there were serious issues to be tried, whether damages would be an adequate remedy for the plaintiff should he succeed at the trial, the balance of convenience and all other discretionary factors. For the reasons stated in my judgment in *Tan Guan Eng & Anor v Ng Kweng Hee & Ors*,[24] I decided these questions in favour of the plaintiff. E

In all the circumstances, the applications to discharge the injunctions were dismissed with costs and an early trial ordered.

Applications dismissed. F

Reported by PS Ranjan

G

H

I